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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

EDITH MACIAS, individually and on
behalf of similarly situated
individuals; HOTON DURAN;
TIFFANY HUYNH; AURA MENDIETA;
WILLIAM LABOY; MIGUEL ACOSTA;
CRUZ ACOSTA; CUAUHEMOC
TORAL; and TERESA VILLEGAS,

Plaintiffs,

vs.

THOMAS J. TOMANEK; and
MARK GARIBALDI, individually
and doing business as THE
GARIBALDI COMPANY,

Defendants.

Case No. C07-3437 JSW

PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTIONS TO BE
DECLARED PREVAILING PARTIES
AND FOR AN AWARD OF
ATTORNEYS' FEES AND COSTS

*Matter Referred to Magistrate Judge
Elizabeth D. LaPorte (Doc. 43)*

Hearing: None scheduled

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PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS TO BE DECLARED PREVAILING
PARTIES AND FOR AN AWARD OF ATTORNEYS' FEES AND COSTS - Case No. C 07-3437 JSW

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I. INTRODUCTION

Defendants Thomas J. Tomanek and Mark Garibaldi have filed motions to be declared the prevailing parties in this action pursuant to California Civil Code § 1717 and for an award of costs and attorneys' fees. (See Doc. 37, 38, 39, 40, 41 and 42.) Together, defendants seek a total of \$85,626.00 in attorneys' fees and \$3,811.40 in costs¹ following the Court's dismissal of plaintiffs' RICO claims with prejudice and dismissal of their related state claims for lack of subject-matter jurisdiction. Defendant landlords assert that they should be deemed the prevailing parties in this action based on an attorneys' fees provision in the lease agreements between them and plaintiffs, their former tenants. Their motions should be denied in their entirety because defendants do not qualify as prevailing parties on a contract under § 1717.

II. PROCEDURAL BACKGROUND

Plaintiff Edith Macias, on behalf of herself and a class of similarly situated persons, and plaintiffs Hoton Duran, Tiffany Huynh, Aura Mendieta, William Laboy, Miguel Acosta, Cruz Acosta, Cuauhtemoc Toral and Teresa Villegas filed this action against defendants Mark Garibaldi, individually and doing business as The Garibaldi Company (collectively referred to as "Garibaldi"), and Thomas J. Tomanek. Plaintiffs are former tenants of the Rancho Luna & Rancho Sol Apartments, a large rental complex located in Fremont, California. Defendant Tomanek is the owner of the complex, and Garibaldi is the property manager. (Doc. 1, 19, ¶¶ 4-14.) Plaintiffs alleged that defendant Garibaldi violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq., by engaging in a scheme of misrepresentation and other unlawful acts in connection with obtaining and retaining tenants' security deposits and demanding additional payments for alleged property damage upon move-out. Plaintiffs alleged pendant state claims against both Garibaldi

¹Tomanek seeks \$35,664.00 in fees and \$187.53 in costs. Garibaldi seeks \$49,962.00 in fees and \$3,623.87 in costs.

1 and Tomanek for violation of California Business & Professions Code § 17200, violation
 2 of California Civil Code § 1950.5 (relating to security deposits), for fraud, tortious breach
 3 of the implied covenant of good faith and fair dealing, unjust enrichment, negligence
 4 and defamation (of certain individual plaintiffs). (Doc. 19, ¶¶ 75-104.)

5 Defendants filed motions to dismiss plaintiffs' complaint pursuant to Rule
 6 12(b)(6) for failure to state a claim under RICO, and to dismiss plaintiffs' remaining
 7 claims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). (Doc. 7, 11.)
 8 Plaintiffs then filed a first amended complaint on September 28, 2007, revising their
 9 RICO allegations and adding Kapika Salambue and Marina Duran as plaintiffs. (Doc.
 10 19 ["FAC"].) Defendants again moved to dismiss the first amended complaint for failure
 11 to state a claim under RICO, and to dismiss plaintiffs' remaining claims for lack of
 12 subject matter jurisdiction pursuant to Rule 12(b)(1). (Doc. 20, 22.)

13 On January 8, 2008, Judge White issued an order granting defendants' motion to
 14 dismiss the RICO claim, finding that the allegations were insufficient to support a RICO
 15 violation based upon mail fraud. (Doc. 35, pp. 2-5.) The Court declined to exercise
 16 supplemental jurisdiction over plaintiffs' state law claims, and dismissed the complaint
 17 in its entirety. (Doc. 35 p. 5.) The Court concluded by stating that defendants' motions
 18 were granted with prejudice, but noted "that Plaintiffs are not without a potential remedy
 19 in state court." (Doc. 35, p. 6.) Thereafter, the Court dismissed the case. (Doc. 36.)
 20 Defendants' motions for attorneys' fees followed.

21 **III. RELEVANT FACTS**

22 The first amended complaint described an alleged scheme by Garibaldi to
 23 defraud tenants out of the rightful return of their security. Pursuant to Civil Code §
 24 1950.5(e), a landlord "may not assert a claim against the tenant or the security for
 25 damages to the premises or any defective conditions that preexisted the tenancy, for
 26 ordinary wear and tear or the effects thereof, whether the wear and tear preexisted the
 27 tenancy or occurred during the tenancy, or for the cumulative effects of ordinary wear
 28

and tear occurring during any one or more tenancies.”² Plaintiffs alleged that, upon move-in, they provided defendants with significant security deposits based on the misrepresentation that they would not be charged for the ordinary wear and tear on the property. Later, when they vacated the apartments, plaintiffs allege that they were, in fact, charged for the ordinary wear and tear to the property, often in amounts greater than the security deposit. Plaintiffs further alleged that defendant Garibaldi engaged in a pattern of racketeering activity in violation of RICO by engaging in a scheme of misrepresentation to induce them to part with their security deposits, that he did so knowing he would not refund those deposits, and that he used the U.S. mails in furtherance of that scheme when he mailed the security deposit closing statements to plaintiffs advising them of dispositions of the security deposits. (Doc. 19, FAC ¶¶ 22-59, 66-72.)

Each of the eleven plaintiffs, residing in eight separate households, alleged that they were victims of Garibaldi’s scheme to defraud, based on facts similar to those alleged by plaintiffs Edith Macias and Hoton Duran in the first amended complaint:

17. On October 21, 2004, plaintiffs Edith Macias and Hoton Duran entered into a written lease agreement with The Garibaldi Company at the Rancho Luna & Rancho Sol Apartments for rental of apartment 246 in the Rancho Luna section of the complex. Plaintiffs were assisted in the execution of the lease agreement by an individual, whom plaintiffs are informed and believe was an employee of The Garibaldi Company, who

²A landlord may claim from a tenant’s security deposit only those amounts as are reasonably necessary (1) to compensate the landlord for a tenant’s default in the payment of rent; (2) to repair damages to the premises, exclusive of ordinary wear and tear, caused by the tenant or by a guest or licensee of the tenant; (3) to clean the premises upon termination of the tenancy as necessary to return the unit to the same level of cleanliness it was in at the inception of the tenancy; or (4) to remedy future defaults by the tenant in any obligation under the rental agreement to restore, replace, or return personal property or appurtenances, exclusive of ordinary wear and tear, if the security deposit is authorized to be applied thereto by the rental agreement. California Civil Code § 1950.5(e).

1 countersigned the lease agreement on behalf of The Garibaldi Company.
2 Pursuant to the agreement, Ms. Macias and Mr. Duran paid \$1,700 as a
3 security deposit before commencing their tenancy. Under the terms of the
4 agreement, The Garibaldi Company agreed to return the \$1,700 security
5 deposit by mail within three weeks of the tenants' vacating the unit, less
6 any charges for damage to the premises, fixtures or furnishings, but not
7 including charges for reasonable wear and tear.

8 18. *In giving The Garibaldi Company the \$1,700 security deposit, Ms.*
9 *Macias and Mr. Duran reasonably relied on The Garibaldi Company to*
10 *abide by the terms of its representations in the lease agreement and the*
11 *law, including California Civil Code § 1950.5(e), and not to charge them*
12 *for reasonable wear and tear to the unit.*

13 19. *The representation of The Garibaldi Company in the lease*
14 *agreement that it would not charge Ms. Macias and Mr. Duran for*
15 *reasonable wear and tear to the unit was false, or made with reckless*
16 *disregard to its falsity, because The Garibaldi Company intentionally*
17 *followed a policy and practice of unlawfully charging vacating tenants for*
18 *reasonable wear and tear to their unit.*

19 20. On November 1, 2005, Ms. Macias and Mr. Duran vacated
20 apartment 246. Before vacating that apartment, Ms. Macias and Mr.
21 Duran requested an initial inspection by defendants. The purpose of that
22 inspection was to allow Ms. Macias and Mr. Duran the opportunity to
23 remedy deficiencies identified by defendants in order to avoid deductions
24 from his security deposit. But defendants failed or refused to conduct that
25 inspection in accordance with California Civil Code § 1950.5(f)(1). At the
26 time that Ms. Macias and Mr. Duran vacated apartment 246, that dwelling
27 had been returned to the same condition, except for normal wear and
28 tear, and same level of cleanliness as it was at the inception of their
tenancy.

21. Nonetheless, defendants unlawfully, and acting in bad faith,
charged \$2,818.75 for cleaning and damage to apartment 246, deducting
that sum from the security deposit paid by Ms. Macias and Mr. Duran.
Defendants retained, and continue to retain, the full amount of plaintiffs'

1 security deposit. Because the charges exceed the amount of the security
 2 deposit, defendants claim that Ms. Macias and Mr. Duran owe defendants
 3 \$1,160.75. Defendants have sought to collect those unlawful charges
 4 from Ms. Macias and Mr. Duran through the use of a collection agency,
 5 T.A. Ross Collections. In July 2006, defendants placed the alleged debt
 6 with T.A. Ross Collections for attempted collection. Since that time, T.A.
 7 Ross Collections has made a report to the national credit reporting
 8 agencies regarding Ms. Macias, stating that the alleged debt is in
 9 collection, resulting in a negative mark on Ms. Macias' credit report.

10 (Doc. 19, FAC ¶¶ 17-21 [emphasis added]. See also ¶¶ 22-59.)

11 The allegations contained in plaintiffs' RICO claim further provide:

12 At the commencement of their tenancies at the Rancho Luna & Rancho
 13 Sol Apartments, plaintiffs William Laboy, Cuauhtemoc Toral, Teresa
 14 Villegas, Miguel Acosta, Cruz Acosta, Kapika Salambue and Marina
 15 Duran, and the members of the plaintiff class, each paid security deposits
 16 to The Garibaldi Company, in reasonable reliance on The Garibaldi
 17 Company's representation that it would return those security deposit by
 18 mail within three weeks of the tenants' vacating the unit, less any charges
 19 for damage to the premises, fixtures or furnishings, but not including
 20 charges for reasonable wear and tear. The representation of The
 21 Garibaldi Company in the lease agreement that it would not charge
 22 plaintiffs for reasonable wear and tear to the unit was false, or made with
 23 reckless disregard to its falsity, because The Garibaldi Company
 24 intentionally followed a policy and practice of unlawfully charging vacating
 25 tenants for reasonable wear and tear to their unit.

26 (Doc. 19, FAC ¶ 71(9).) Judge White's order described the scheme to defraud alleged
 27 by plaintiffs in their RICO claim to be "based on the misrepresentations made to them to
 28 induce them to part with their security deposits, and that Garibaldi used the United
 States mails in furtherance of that scheme by sending them the security deposit closing
 statements through the mails." (Doc. 35, p. 3.)

Defendants have now filed motions for attorneys' fees and costs. Prevailing
 defendants cannot recover attorneys' fees under the RICO statute because that
 provision only permits plaintiffs to recover fees. Chang v. Chen, 95 F.3d 27, 28 (9th Cir.

1996). Instead, defendants seek to recover attorneys' fees based on the following provision contained in the form lease agreement they require new tenants to sign:

ATTORNEY'S FEES AND COSTS: Tenant acknowledges that if any legal action or proceeding to enforce the terms of this agreement is necessary, the prevailing party in such action is entitled to recovery of a reasonable attorney fee and costs of such action in addition to all other amounts owed, to the extent authorized by state law.

(Doc. 38, exh. A, p. 8 of 42.) That attorneys' fees provision does not support an award of attorneys' fees and costs in this action.

IV. SUMMARY OF ARGUMENT

Defendants' motion is based on the erroneous premise that their litigation success on plaintiffs' RICO claims is a victory under California Civil Code § 1717 entitling them to prevailing party status and an award of attorneys' fees pursuant to the lease agreements between the parties. The only victory achieved by defendants was the dismissal with prejudice of plaintiffs' RICO claims based on mail fraud. There has been no victory "on a contract" entitling defendants to attorneys' fees. California law is clear that tort claims, including claims based on fraud, are not claims "on a contract," and that an action based on fraud arising out of a contract is not an action to enforce a contract within the meaning of § 1717. Santisas v. Goodin, 17 Cal. 4th 599, 615 (1998); Stout v. Turney, 22 Cal. 3d 718, 730 (1978). Thus, defendants' victory on plaintiffs' RICO claim does not give defendants' prevailing party status under § 1717 and their motion must be denied in its entirety. Even if California law was not so clearly in plaintiffs' favor, longstanding legal principles support denial of defendants' motions. If an award of attorneys' fees is found appropriate, however, the amount should be substantially less than that sought by defendants.

V. ARGUMENT

A. Defendants' Motions Should be Denied Because They are Not the Prevailing Parties on a Contract.

Defendants contend they must be deemed the prevailing parties "on the

1 contract” pursuant to California Civil Code § 1717 and are entitled to their fees and
 2 costs. (Motion at 6-9.) Plaintiffs agree with defendants that California law applies to
 3 the determination of whether to award fees pursuant to a contract. Berkla v Corel
 4 Corp., 302 F.3d 909, 919, n. 11 (9th Cir. 2002). Under that law, however, defendants
 5 are not entitled to attorneys’ fees here.

6 California permits parties to allocate attorney's fees by contract. See Cal. Civ.
 7 Proc. Code § 1021 (“Except as attorney's fees are specifically provided for by statute,
 8 the measure and mode of compensation of attorneys and counselors at law is left to the
 9 agreement, express or implied, of the parties....”). Parties can agree that attorneys’
 10 fees may be recoverable in any action between them, whether based on contract or
 11 tort. Santisas v. Goodin, 17 Cal.4th at 608. See also 3250 Wilshire Blvd. Bldg. v. W.R.
 12 Grace & Co., 990 F.2d 487, 489 (9th Cir. 1993) (applying California law).

13 Whether an agreement contemplated by Code of Civil Procedure § 1021 covers
 14 tort claims depends on the wording of the contract. Provisions providing for attorneys’
 15 fees incurred for claims “arising out of” the agreement, or “with respect to the subject
 16 matter” of an agreement, are interpreted to allow attorneys’ fees to the prevailing party
 17 in both tort and breach of contract claims. See Santisas, 17 Cal.4th at 608; 3250
 18 Wilshire Blvd. Bldg., 990 F.2d at 489. On the other hand, provisions providing for
 19 attorneys’ fees incurred for claims brought “to enforce” the agreement are limited to
 20 fees regarding the contract claims. Casella v. SouthWest Dealer Services, Inc., 157
 21 Cal. App.4th 1127, 69 Cal. Rptr.3d 445, 471 (2007); El Escorial Owners' Ass'n v. DLC
 22 Plastering, Inc., 154 Cal. App.4th 1337, 1365 (2007); Gil v Mansano, 121 Cal. App.4th
 23 739, 745 (2004). See also Hasler v. Howard, 120 Cal. App. 4th 1023, 1027 (2004) (fee
 24 provision providing for fees in actions “regarding the obligation to pay compensation”
 25 did not cover fraud and breach of fiduciary duty claims).

26 **1. The narrow fee provision in this case applies only to contract**
 27 **claims.**

28 The fee provision in the lease agreement in this case applies only to actions “to

1 enforce” the terms of the agreement. (See Doc. 38, exh. A, p. 8 of 42.) That narrow
 2 language cannot be construed to authorize an award of attorneys’ fees to the prevailing
 3 party in actions asserting claims based on fraud or tort, such as plaintiffs’ RICO claim.
 4 In apparent recognition of that, defendants make not attempt to argue that their fee
 5 provision applies to fraud or tort claims. Instead, they claim that they qualify as
 6 prevailing parties under California Civil Code § 1717 because plaintiffs’ RICO claim was
 7 “on a contract.” That claim cannot be sustained.

8 California Civil Code § 1717 provides:

9 In any action *on a contract*, where the contract specifically provides
 10 that attorney's fees and costs, *which are incurred to enforce that contract*,
 11 shall be awarded either to one of the parties or to the prevailing party,
 12 then the party who is determined to be the party prevailing on the
 13 contract, whether he or she is the party specified in the contract or not,
 shall be entitled to reasonable attorney's fees in addition to other costs.

14 Cal. Civ. Code § 1717(a) (emphasis added). Section 1717(b)(1) further provides that
 15 the court, upon notice and motion by a party, “shall determine who is the party
 16 prevailing *on the contract for purposes of this section*, whether or not the suit proceeds
 17 to final judgment. . . . [T]he party *prevailing on the contract* shall be the party who
 18 recovered a greater relief in the action *on the contract*. The court may also determine
 19 that there is no party prevailing *on the contract* for purposes of this section.” (Emphasis
 20 added).

21 Civil Code § 1717 “covers *only* contract actions, where the theory of the case is
 22 breach of contract, and where the contract sued upon itself specifically provides for an
 23 award of attorney fees incurred to enforce *that* contract.” Xuereb v. Marcus & Millichap,
 24 Inc., 3 Cal. App.4th 1338, 1342 (1992) (emphasis in original). But when a claim comes
 25 within the scope of § 1717 – that is, causes of action sounding in contract and based on
 26 a contract containing an attorney fee provision) – the provisions (and protections) of §
 27 1717 override the parties’ contractual agreement. Santisas, 17 Cal. 4th at 617.
 28 Therefore, in order to qualify for an award of attorneys’ fees under the lease agreement

1 in this case, defendants must meet the requirements of § 1717. Because § 1717
 2 applies only to claims “on a contract,” defendants are forced to argue that plaintiffs’
 3 RICO claim is “on a contract” in order to justify bringing their motions. The law is clear,
 4 however, that tort claims, including RICO claims, cannot be construed to be brought “to
 5 enforce” a contract within the meaning of § 1717.

6 **2. Claims based on fraud, such as RICO, are not “on a contract.”**

7 Defendants’ argument that they are the prevailing parties in this action pursuant
 8 to § 1717 ignores the principal requirement for a successful claim under that statute --
 9 the party seeking fees must be a prevailing party “on a contract.” Key to the language
 10 of § 1717 is that it applies only to actions “on a contract.” Santisas v. Goodin, 17 Cal.
 11 4th at 615. It does not apply to tort actions or to tort claims within an action. Id.; Gil v
 12 Mansano, 121 Cal. App.4th at 743 (§ 1717 does not apply to tort claims; it determines
 13 which party, if any, is entitled to attorneys’ fees on a contract claim only). California law
 14 is well-settled that a tort action for fraud arising out of a contract is not an action “on a
 15 contract” within the meaning of Civil Code § 1717. Stout v. Turney, 22 Cal. 3d at 730.
 16 See also McKenzie v. Kaiser-Aetna, 55 Cal. App.3d 84, 88-89 (1976) (an action for
 17 negligent misrepresentation with regard to a contract is not an action to enforce a
 18 contract under § 1717). Nor can an award of attorneys’ fees under § 1717 “be
 19 sustained on the theory that the tort claims were brought to ‘enforce the terms’ of the
 20 lease.” Casella v. SouthWest Dealer Services, Inc., 69 Cal. Rptr.3d at 471 (citations
 21 omitted). Tort-based misrepresentation simply is not within § 1717’s domain. Childers
 22 v. Edwards, 48 Cal. App.4th 1544, 1549 (1996).³

23 Plaintiffs’ RICO claims are not claims “on a contract.” There is no question that
 24 RICO is founded in tort. See, e.g., Brady v. Dairy Fresh Products Co., 974 F.2d 1149,

26 ³Because § 1717 is not applicable to tort claims, the cases cited and arguments
 27 made by defendants at pages 7-9 of Tomanek’s brief showing that they are the
 28 prevailing parties under § 1717 as a matter of law because of their “unqualified victory”
 on the federal RICO claim have no application to this proceeding. (Doc. 37.)

1 1154 (9th Cir. 1992) (holding that traditional respondeat superior and agency principles
 2 apply to RICO). Plaintiff alleged mail fraud as the underlying racketeering activity. As
 3 discussed below, the Ninth Circuit has previously held that a RICO claim was not
 4 brought to “enforce” a contract. See Stitt v. Williams, 919 F.2d 516, 520, 529-30 (9th
 5 Cir. 1990). Therefore, defendants’ success in obtaining dismissal of plaintiffs’ RICO
 6 claims with prejudice cannot support according them prevailing party status under §
 7 1717.

8 **3. The California Supreme Court’s Santisas opinion precludes**
 9 **defendants’ argument that § 1717 covers any claim “involving” a**
 10 **contract.**

11 Nowhere do defendants acknowledge the fundamental principle, reaffirmed by
 12 the California Supreme Court in Santisas, that § 1717 does not apply to claims based
 13 on tort or fraud. Santisas, 17 Cal. 4th at 615. Instead, defendants simply assert that
 14 plaintiffs’ RICO claims *are* based on the contract. Their arguments cannot be
 15 sustained. Specifically, defendants cite In re Baroff, 105 F.3d 439 (9th Cir. 1997), for
 16 the proposition that the California courts liberally construe the phrase “on a contract”
 17 under § 1717 to extend to any action as long as it involves a contract and one of the
 18 parties would be entitled to attorneys’ fees under the contract if it prevailed in the
 19 lawsuit. (Motion at 10-11.) Such a broad construction of § 1717 is no longer valid, if it
 20 ever was. More recently, the Ninth Circuit Bankruptcy Appellate Panel has refused to
 21 give effect to the Baroff’s broad language regarding what claims are “on a contract”
 22 within the meaning of § 1717 because the Baroff decision pre-dates the California
 23 Supreme Court’s Santisas opinion, cited above, emphasizing the narrow view that §
 24 1717 applies *only* to contract claims. See In re Davison, 289 B.R. 716, 723-24 (9th Cir.
 25 B.A.P. 2003) (following Santisas’ view on § 1717 rather than Baroff’s). Thus, state law
 26 as set forth by the Supreme Court in Santisas precludes the broad application of § 1717
 27 to plaintiffs’ RICO claim as suggested by defendants.

28 Even if Baroff could be considered good law on what constitutes an action “on a
 contract” under § 1717, it is distinguishable from this case. Baroff was a bankruptcy

1 case involving a nondischargeability action regarding claims that had been released
 2 pursuant to a settlement agreement between the plaintiffs and the debtor. The plaintiffs
 3 alleged that, despite the release, certain of the debtor's debts should not be discharged
 4 because the release had been obtained through fraud. The bankruptcy court
 5 determined that the settlement agreement precluded the plaintiffs' nondischargeability
 6 action and granted summary judgment in favor of the debtor. Although the settlement
 7 agreement contained a provision granting attorneys' fees to the prevailing party in an
 8 action to enforce the agreement, the bankruptcy court refused to award fees to the
 9 debtor. Ultimately, the Ninth Circuit reversed.

10 The Ninth Circuit panel recognized that § 1717 did not apply to a tort action for
 11 fraud arising out of a contract. Id. at 443. It found, however, that the case before the
 12 bankruptcy court was to avoid or rescind the agreement, and was therefore "on the
 13 contract." Id. at 442-43. Moreover, the bankruptcy court had to adjudge the validity of
 14 the settlement agreement in order to determine dischargeability. In this case, the
 15 validity of the lease agreements between plaintiffs and defendants is unimportant. In
 16 fact, Judge White's order dismissing plaintiffs' RICO claim does not mention – let alone
 17 rely upon – the lease agreement between the parties as being at the heart of plaintiffs'
 18 claim. (Doc. 35.) The opinion turned on the application of federal statutory law,
 19 namely, the mail fraud statute, 18 U.S.C. § 1341, and RICO. Therefore, even if Baroff
 20 was still good law, it would not compel a finding that plaintiffs' RICO claims were "on a
 21 contract" within the meaning of § 1717.

22 **4. Allegations regarding their lease agreements with defendants**
 23 **does not turn plaintiffs' RICO action into a claim "on a contract."**

24 Despite the clear California law, defendants go on to argue that plaintiffs' RICO
 25 claims are "on a contract" because the first amended complaint contains factual
 26 allegations regarding the contract and because the dispute concerns plaintiffs' security
 27 deposits, which were part of the contract between plaintiffs and defendants. (Doc. 37 at
 28 11-12.) Although the facts alleged by plaintiffs forming the basis for their RICO (and

1 other tort claims) *involve* a contract, the action does not seek to *enforce* a contract.
2 That conclusion is based on the application of traditional tort principles.

3 The facts alleged by plaintiffs, although making reference to the lease
4 agreement, establish the elements for claims based on fraud and deceit. Those
5 elements are (a) misrepresentation, (b) knowledge of falsity, (c) intent to defraud, i.e., to
6 induce reliance, (d) justifiable reliance, and (e) resulting damage. Lazar v. Superior
7 Court, 12 Cal. 4th 631, 638 (1996). "Promissory fraud" is a subspecies of the action for
8 fraud and deceit. Id. An action for promissory fraud may lie where a defendant
9 fraudulently induces the plaintiff to enter into a contract. Id. Here, Judge White's order
10 described the scheme to defraud alleged by plaintiffs to be "based on the
11 misrepresentations made to them to induce them to part with their security deposits."
12 (Doc. 35, p. 3.)

13 A tort action for fraud arising out of a contract will lie whether or not the
14 underlying contract is itself enforceable. Restatement (Second) of Torts § 530 cmt. 1(c)
15 (1977). Even if the contract is enforceable, the plaintiff still has a tort claim for fraud.
16 Id. A claim arising out of fraudulent inducement is considered to rest upon an
17 independent tortious act – the plaintiff sues not for any breach of contract but for
18 injuries suffered as a result of the defendants' conduct which is separate and distinct
19 from the formal contract. Price Bros. Co. v. Olin Const. Co., Inc., 528 F. Supp. 716,
20 721 (S.D.N.Y. 1981); Plum Tree, Inc. v. N. K. Winston Corp., 351 F. Supp. 80, 85
21 (S.D.N.Y. 1972).

22 Thus, although a written contract may form the basis for the relationship between
23 plaintiffs and defendants – like in most landlord-tenant relationships – plaintiffs' RICO
24 claim was not brought "to enforce" that contract. The legal rights asserted by plaintiffs
25 exist regardless of whether the contract provisions are enforceable. Plaintiffs asserted
26 rights under a federal statute, RICO, a state statute, Civil Code § 1950.5, and for
27 injuries arising out of defendants' scheme of misrepresentation. If defendants'
28 interpretation is given effect, then every lawsuit between a landlord and tenant must be

1 considered to be “on a contract” because that is the basis for their relationship. That is
 2 a particularly troubling result because, at least in the residential arena, a rental
 3 agreement is usually an adhesion contract the terms of which a tenant has little or no
 4 bargaining power over.⁴ Any landlord who tracked statutory language in his form lease
 5 agreement could automatically render any tort action by his tenant seeking to assert
 6 those statutory right to be “on the contract.” The folly of such an interpretation has long
 7 been recognized. A tort may grow out of or be coincident with a contract. The fact that
 8 there exists a contract between the parties does not preclude tort actions between
 9 them. Jones v. Kelly, 208 Cal. 251, 255 (1929).

10 Defendants, nonetheless, contend that the gravamen of plaintiffs’ claim is
 11 enforcement of a contract, and cite Fairchild v. Park, 90 Cal. App.4th 919 (2001), as
 12 authority for determining whether a claim is based on contract or tort. (Doc. 37 at 12.)
 13 Fairchild provides that the nature of the right sued upon must be looked at – “if based
 14 on a breach of promise it is contractual; if based on breach of a noncontractual duty it is
 15 tortious.” Id. at 924. That seemingly broad language, however, does not support
 16 defendants’ argument. The court in Fairchild did not give a full recitation of the
 17 recognized standards on which to make a determination whether a cause of action is
 18 based on tort or contract. The source of the language in Fairchild is Voth v. Wasco
 19 Public Util. Dist., 56 Cal. App.3d 353, 356 -57 (1976), which further states:

20 If the breach is both contractual and tortious, we must ascertain which
 21 duty is the quintessence of the action. If it is unclear, courts generally will
 22 consider the action to be in contract rather than in tort. [] *However, if the*
 23 *action is predicated on a duty independent of the contract, it will be*
 24 *deemed to be in tort regardless of the contractual relation of the parties.*
 25 For example, actions based on a negligent failure to perform a contractual
 duty owing from a hospital to a patient [], from a common carrier to a

26 ⁴The term “adhesion contract” signifies “a standardized contract, which, imposed
 27 and drafted by the party of superior bargaining strength, relegates to the subscribing
 28 party only the opportunity to adhere to the contract or reject it.” Graham v. Scissor-Tail,
Inc., 28 Cal.3d 807, 820 n.16 (1981).

1 passenger [], from an employer to an employee [], and from a landlord to
2 a tenant (Jones v. Kelly (1929) 208 Cal. 251), although containing both
3 contract and tort elements are regarded as [tortious] since the negligence
is regarded as the basis of the wrong.

4 Voth, 56 Cal. App.3d at 357 (citations omitted; emphasis added).

5 Here, plaintiffs' RICO claims were based on duties independent of the lease
6 agreement between the parties. RICO claims do not require an underlying contract,
7 and plaintiffs' RICO claims could have been brought even if the parties had never
8 entered into a formal lease agreement. Plaintiffs sought to enforce duties arising out of
9 tort and statutory duties independent of the lease agreement. RICO provides a federal
10 statutory remedy to persons injured in their property because of racketeering activity –
11 not persons injured by breach of contract. Even if plaintiffs had prevailed on their RICO
12 claim, they would not have “enforced” the contract – they would have obtained
13 damages for their injuries as allowed by the RICO statute, 18 U.S.C. § 1964(c).

14 Defendants themselves previously recognized that the gravamen of plaintiffs'
15 case was not breach of contract, but enforcement of statutory duties. In their motion to
16 dismiss plaintiffs' action, defendants consistently described plaintiffs' case, not in terms
17 of the enforcement of a contract, but in the enforcement of a statute – California Civil
18 Code § 1950.5. See Garibaldi's motion to dismiss [doc. 22] at 2 (“The essence of
19 plaintiffs' claim is that defendants violated the California statute that delineates a
20 landlord's rights and obligations with respect to security deposits”), at 4 (“The gravamen
21 of the FAC is that defendants' actions violated California Civil Code § 1950.5, which
22 governs a landlord's handling and disposition of security deposits”), and 13 (“This is a
23 state law case, a dispute between landlord and tenants, founded on alleged violations
24 of California Civil Code § 1950.5”).

25 For all of these reasons, California law precludes a finding that plaintiffs' RICO
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27
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claims are claims “on a contract” within the meaning of § 1717.⁵

5. Although a contract may authorize an award of attorneys’ fees in a RICO case, the lease agreement in this case does not.

There is no bar to a contractual agreement that allows for attorneys’ fees to a prevailing party in a case brought under RICO. Chang v. Chen, 95 F.3d at 28. Nonetheless, the narrow fee provision in this case cannot support such an award to defendants. There have been two Ninth Circuit cases involving contractual fee claims by prevailing defendants in RICO actions, Stitt v. Williams, 919 F.2d 516, and Chang v. Chen, 95 F.3d 27. Both support denying defendants’ motions.

In Stitt v. Williams, a group of limited partners sued the general partner alleging violations of RICO, securities violations, and common law fraud. 919 F.2d at 520. The district court granted summary judgment in favor of the general partner, who then moved for attorneys’ fees based on fee provisions in a number of limited partnership agreements, which fell into two categories: one provided for fees to the prevailing party in any action “to enforce” the partnership agreement, while the other provided fees to the prevailing party in any action “pertaining to Partnership affairs.” Id. at 529-30. The district court denied the fee motion and, on appeal, the Ninth Circuit affirmed the district court’s refusal to allow fees pursuant to the provision allowing fees “to enforce” the agreement. The Ninth Circuit stated:

Appellees cannot recover attorneys’ fees or costs under this provision

⁵Defendants also may attempt to argue that plaintiffs’ RICO claim was “on the contract” because the prayer for relief sought declaratory relief and attorneys’ fees. (See Doc. 37 at 5 n.4, 6.) Plaintiffs requested declaratory relief under their RICO claim, seeking “an order declaring unlawful defendants’ pattern and practices complained of herein.” (FAC ¶ 73, Prayer ¶ 2.) Plaintiffs did not seek declaratory relief with respect to the rights or obligations contained in the lease agreements. And, although plaintiffs did request attorneys’ fees in their prayer, plaintiffs never cited the lease agreement as a source for those fees. Rather, plaintiffs’ RICO claim provides for attorneys’ fees for the prevailing plaintiff, 18 U.S.C. § 1964(c), and plaintiffs could be eligible for an award of fees under the state private attorney general statute, Civil Code of Civil Procedure § 1021.5. The relief sought in this case – consistent with plaintiffs’ RICO and statutory claims – does not establish that plaintiffs’ claims were “on a contract.”

1 because appellants brought this action not to “enforce” the limited
2 partnership agreements but rather to collect damages based on the
3 allegedly fraudulent conduct of [the general partner] in connection with the
4 partnerships’ formation and operation, or, alternatively, to rescind or
reform the partnership agreements.

5 Id. at 529-30. Thus, Stitt directly supports a finding that the fee provision at issue here
6 allowing fees “to enforce” the lease agreement does not give rise to a claim for
7 attorneys’ fees in a RICO action.

8 In Chang, the plaintiffs’ RICO action was dismissed with prejudice for failure to
9 state a claim, and the dismissal was affirmed by the court of appeals. The prevailing
10 defendants then sought an award of attorneys’ fees pursuant to a written contract with
11 the plaintiffs. The real estate sales contract at issue provided that the prevailing party
12 in any action “arising out of the execution of this agreement or the sale” would be
13 entitled to attorneys’ fees. Chang, 95 F.3d at 28. In reaching its decision, the Ninth
14 Circuit implicitly recognized that a fee provision covering only contract claims would not
15 support a fee award in a RICO action. Id. While it found that the “arising out of”
16 language of the particular fee agreement was broad enough to cover claims for
17 common law fraud, it went on to hold that the language still did not cover federal RICO
18 claims. Id. at 28-29. The court’s decision turned on the RICO pattern requirement –
19 because RICO requires a pattern of racketeering activity, and no pattern arose out of
20 any one contract, the contractual provision authorizing fees could not apply to fees
21 incurred in a RICO action. Id. Therefore, even if the fee provision in Chang could be
22 construed to apply to fraud claims, it could not be construed to apply to RICO claims.

23 Likewise, in this case, because RICO requires proof of a pattern of predicate
24 acts – not just one – and each of the leases here permit an award of attorneys’ fees
25 only with respect to that particular agreement, defendants’ violation of any one
26 agreement could not give rise to a RICO action (assuming a violation of the agreement
27 could form the basis for plaintiffs’ RICO suit, which plaintiffs dispute). Like in Chang, no
28 one plaintiff in this case executed more than one agreement. Accordingly, as in Chang,

1 the RICO pattern in this case could not be based on defendants' failure to perform any
2 one lease, and attorneys' fees cannot be awarded to defendants.

3 Defendants also contend that a district court case, International Marble of
4 Colorado v. Congress Financial Corp., 465 F. Supp. 2d 993 (C.D. Cal. 2006), supports
5 an award of fees for plaintiffs' RICO claims in this case. (Doc. 37 at 12-13.) It does
6 not. The fee agreement in that case provided that fees were payable if incurred in
7 connection with enforcement *or* defending any claims made "arising out of the
8 transactions" contemplated in the agreement. Id. at 1001. As the district court
9 observed, that fee provision "is about as broad as one can imagine," and it included
10 both contract and tort claims. Id. at 1002. Although under the terms of § 1717, the
11 defendant could not recover fees for the contract claim (because they had voluntarily
12 dismissed them), the district court allowed recovery of all fees because the tort and
13 contract claims were intertwined and the tort claims arose out of the transaction
14 contemplated in the parties' agreement. As discussed above, however, the fee
15 provision in this case is narrow and does not apply to tort claims, let alone RICO claims.

16 Thus, in addition to California case law, Ninth Circuit law precludes consideration
17 of RICO claims to be "on a contract" within the ambit of § 1717 and the lease
18 agreement in this case.

19 **6. The fee provision in this case, by its terms, cannot apply to this**
20 **RICO action.**

21 Even if a RICO claims could ever be considered to be "on a contract" within the
22 meaning of § 1717, the terms of the agreement at issue here do not support an award
23 of fees. As discussed above, plaintiffs' RICO claims did not seek enforcement of the
24 lease. Therefore, the fee provision in the lease agreement, by its terms, does not cover
25 plaintiffs' RICO claims. The lease provides that "[t]enant acknowledges that *if any legal*
26 *action or proceeding to enforce the terms of this agreement is necessary*, the prevailing
27 party in such action is entitled to recovery of a reasonable attorney fee and costs of
28 such action." (Doc. 38, exh. A, p. 8 of 42.) Plaintiffs' RICO claims cannot be

1 considered to be “necessary” to enforce the lease agreement within the terms of the fee
 2 provision because enforcement of the contract was unnecessary for plaintiffs to prevail
 3 on their RICO claims (or any other statutory or tort claim for that matter). Therefore, by
 4 its terms, the fee provision is not applicable to plaintiffs’ RICO claims.

5 **7. Defendants cannot be deemed to be prevailing parties under §**
 6 **1717 because there has been no final resolution of any claim “on the**
 7 **contract.”**

8 Finally, even if § 1717 could be found to apply in this case, and the fee provision
 9 itself authorized fees in a RICO action, defendants cannot be considered to be the
 10 prevailing parties under § 1717. It is premature to make a prevailing party
 11 determination under § 1717. Section 1717(b)(1) provides that the “party prevailing on
 12 the contract shall be the party who recovered a greater relief in the action on the
 13 contract.” The California Supreme Court has instructed that, in order to decide whether
 14 there is a “party prevailing on the contract,” the trial court must compare the relief
 15 awarded *on the contract claim* or claims with the parties’ demands on those same
 16 claims and their litigation objectives as disclosed by the pleadings, trial briefs, opening
 17 statements, and similar sources. Hsu v. Abbata, 9 Cal. 4th 863, 876 (1995). The
 18 prevailing party determination is to be made “*only upon final resolution of the contract*
 19 *claims*,” and only by a comparison of the extent to which each party has succeeded and
 20 failed to succeed in its contentions. Id. (emphasis added). The only claim that even
 21 could be considered “on the contract” in plaintiffs’ first amended complaint is claim
 22 number five, for breach of the implied covenant of good faith and fair dealing, although
 23 plaintiffs pled that claim as a tort, seeking damages for emotional distress and punitive
 24 damages. (Doc. 19, ¶¶ 91-96.)

25 Defendants do not argue that the dismissal of their state law claims for lack of
 26 subject matter jurisdiction gives them prevailing party status under § 1717. Nor could
 27 they. As noted by Judge White, plaintiffs still have a potential remedy in state court.
 28 (Doc. 35, p. 6.) Indeed, plaintiffs have refiled their action in the Alameda County

1 Superior Court alleging the same operative facts.⁶ Neither the disposition of plaintiffs'
 2 RICO claims, as discussed above, nor the dismissal of plaintiffs' state claims for lack of
 3 subject matter jurisdiction was a resolution of a claim "on the contract." Therefore,
 4 defendants are not entitled to prevailing party status under § 1717.

5 The Court of Appeal in In re Estate of Drummond, 149 Cal. App.4th 46 (2007),
 6 was faced with a situation analogous to this case. In a nutshell, the case involved
 7 contract claims asserted erroneously in probate court, their subsequent dismissal and
 8 refiling in civil court, and the motion by the defendants in the probate action (who were
 9 also parties in the civil action) for attorneys' fees under a contract provision. The
 10 probate court denied the motion and the court of appeal affirmed. Citing Hsu, the Court
 11 of Appeal concluded that "no fee award can be made" before the final resolution of the
 12 claims "on the contract." Id. at 51. That final resolution is not just the end of a
 13 particular lawsuit, but a final determination on the contract claims. The appellate court
 14 concluded:

15 The dismissal of his petition in the probate matter did not defeat his
 16 contract claims; it merely deflected or forestalled them. By achieving that
 17 result, appellants no more 'prevailed' than does a fleeing army that
 18 outruns a pursuing one. Living to fight another day may be a kind of
 19 success, and surely it is better than defeat. But as long as the war goes
 on, neither side can be said to have prevailed.

20 Id. at 53. Likewise, in this case, the decision on plaintiffs' RICO claim was not a
 21 resolution of any claim "on the contract." Nor was the dismissal of plaintiffs' state
 22 claims for lack of subject matter jurisdiction a final resolution of any claim "on the
 23 contract." Therefore, defendants' cannot be deemed the prevailing parties in this action
 24 and defendants' motion should be denied in its entirety.

25
 26 ⁶Attached hereto as Exhibit 1 is a copy of the file-stamped cover page of
 27 plaintiffs' complaint filed in Alameda Superior Court on January 17, 2008. Plaintiffs
 28 request that the Court take judicial notice of that state court filing. Fed. R. Evid.
 201(b)(2).

8. There is no issue of allocating time spent on tort versus contract claims in this case.

Defendants make an argument that, because plaintiffs' allegations regarding the contract are intertwined with their fraud claims, that somehow they are entitled to all of their attorneys' fees spent on the entire litigation. (Doc. 37 at 12-13.) But, since the RICO claim is not "on a contract," there is no basis for awarding fees or allocating them between tort and contract claims. In this case, defendants prevailed only on a tort claim to which the fee provision did not apply. That victory cannot serve to justify an award of attorneys' fees for defense counsel's work on any, much less all, of plaintiffs' claims.

B. The Amount of Fees Sought by Defendants Should be Reduced, if Any Are Awarded at all.

This motion is in an odd procedural posture – the only claim on which defendants prevailed is not a claim on which they may obtain attorneys' fees pursuant to RICO, § 1717 or the lease agreement. Yet, defendants seek not only fees for the time spent defending the RICO action, but for all time spent on the entire litigation. Even if fees could be recovered, the amount sought is unreasonable.

Plaintiffs do not object to the hourly rates requested by defendants for their counsel, but the number of hours is excessive. The billing records show that the case was overstaffed. Defendant Garibaldi seeks \$49,962.00 in attorneys' fees for work performed by three attorneys and two paralegals from Farbstein & Blackman, and for three attorneys, one paralegal and two case clerks from Wendel, Rosen, Black & Dean LLP, along with \$3,623.87 in costs. (Declaration of John S. Blackman [doc. 41] ["Blackman Dec."] ¶¶ 4-6; Declaration of Carl D. Ciochon [doc. 42] ["Ciochon Dec."] ¶¶ 3-4.) Defendant Tomanek seeks \$35,664.00 in fees for work performed by one attorney from Allman & Nielsen and one attorney from Wilson & Quint, LLP, and \$187.53 in costs. (Declaration of Sara B. Allman [doc. 38] ["Allman Dec."] ¶¶ 5-7; Declaration of Matthew F. Quint [doc. 39] ["Quint Dec."] ¶ 3.)

The time records show the following time that can reasonably be allocated to the RICO claim:

1 • Between August 17, 2007, and September 14, 2007, Garibaldi's
 2 counsel (4 attorneys) spent 65.7 hours preparing their motion to dismiss
 3 plaintiffs' complaint [doc. 11] and coordinating that motion with defendant
 4 Tomanek.⁷

5 • Between August 17, 2007, and September 14, 2007, Tomanek's
 6 counsel spent 26.8 hours preparing their motion to dismiss plaintiffs'
 7 complaint [doc.7] and coordinating their motion with counsel for defendant
 8 Garibaldi.⁸

9 • Between September 18, 2007, and October 18, 2007, defendant
 10 Garibaldi's attorneys spent another 19.3 hours preparing their motion to
 11 dismiss plaintiffs' first amended complaint [doc. 22] and coordinating that
 12 motion with defendant Tomanek's counsel.⁹

13 • Between September 18, 2007, and October 18, 2007, defendant
 14 Tomanek's attorneys spent 13.5 hours preparing their motion to dismiss
 15 plaintiffs' first amended complaint [doc. 20] and coordinating that motion
 16 with defendant Garibaldi's counsel.¹⁰

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 18 ⁷ John Blackmun – 29.2 hours ([doc. 41] entries 8/17/07, 8/20/07, 8/21/07,
 19 8/22/07, 8/23/07, 8/27/07, 8/28/07, 8/29/07, 9/5/07, 9/6/07, 9/13/07, 9/14/07); Peggy
 20 Burton – 13.5 hours ([doc. 41] entries 8/21/07, 8/22/07, 8/23/07); Gary Gleason – 0.3
 21 hours ([doc. 41] entry 8/21/07); and Carl Ciochon – 22.7 hours ([doc. 42] entries
 22 8/21/07, 8/22/07, 8/23/07, 8/24/07, 9/5/07, 9/10/07, 9/11/07, 9/12/07, 9/13/07).

23 ⁸ Sara Allman – 16.4 hours ([doc. 38] entries 8/27/07, 9/4/07, 9/5/07, 9/6/07,
 24 9/11/07, 9/12/07, 9/13/07); and Matthew Quint – 10.4 hours ([doc. 39] entries 8/22/07,
 25 8/23/07, 8/27/07, 9/4/07, 9/5/07, 9/10/07, 9/11/07, 10/5/07, 9/13/07, 9/14/07).

26 ⁹ John Blackmun – 5.0 hours ([doc. 41] entries 10/11/07, 10/16/07); and Carl
 27 Ciochon – 14.3 hours ([doc. 42] entries 10/1/07, 10/2/07, 10/11/07, 10/12/07, 10/15/07,
 28 10/16/07, 10/18/07).

¹⁰ Sara Allman – 6.8 ([doc. 38] entries 9/18/07, 10/1/07, 10/2/07, 10/3/07,
 10/11/07, 10/16/07, 10/8/07), and Matthew Quint – 6.7 hours ([doc. 39] entries 10/1/07,
 10/2/07, 10/3/07, 10/11/07, 10/12/07, 10/15/07).

• Counsel for defendant Garibaldi then spent another 22.9 hours in preparing their reply brief [doc. 31] and in coordinating their reply with defendant Tomanek's attorneys.¹¹

• And, counsel for defendant Tomanek then spent another 7.9 hours in preparing their two-page reply brief [doc. 32] and in coordinating their reply with defendant Garibaldi's attorneys.¹²

That is the time that reasonably can be allocated to defense of plaintiffs' RICO claims. The other time spent on plaintiffs' related state claims and factual investigation will be equally applicable in the new state case and is, in fact, separable from the RICO claims. The hours spent on the RICO claim, multiplied by the billers applicable hourly rate as set forth in defense counsels' declarations are as follows:

Sara Allman	\$165 per hour x 28.7 =	\$ 4,735.50
Matt Quint	\$ 400 per hour x 19.5 =	7,800.00
John Blackman	\$185 per hour x 36.2 =	6,697.00
Peggy Burton	\$185 per hour x 13.5 =	2,497.50
Gary Gleason	\$185 per hour x 0.3 =	55.50
Carl Ciochon	\$325 per hour x 57.9 =	<u>18,817.50</u>
Total:		\$40,603.00

Of that time, however, the individual billing entries are replete with conferences, emails and correspondence between defense counsel. (See, for example, Quint Dec., [doc. 39] p. 7, 8/23/07 ["Numerous e-mails and telephone conference to and from [co-counsel"]; Ciochon Dec., exh. 1 [doc. 42-2], p. 8, 8/23/07 ["Analyze RICO authorities; e-mails with counsel [redacted] telephone with J. Blackman; conference call with S.

¹¹Carl Ciochon 20.9 hours ([doc. 42] entries 11/13/07, 11/14/07, 11/15/07, 11/16/07, 11/19/07, 11/20/07, 11/21/07, 11/26/07), and John Blackman 2.0 hours ([doc. 41] entry 11/13/07).

¹²Sara Allman – 5.5 hours ([doc. 38] entries 11/12/07, 11/15/07, 11/16/07, 11/19/07, 11/26/07), and Matthew Quint – 2.4 hours ([doc. 39] entries 11/19/07, 11/26/07, 11/28/07).

Allman, M. Quint, and J. Blackman”]; Ciochon Dec., exh. 1 [doc. 42-2], p. 11, 9/11/07 [“Revise draft motion to dismiss; e-mail to J. Blackman [redacted] telephone with J. Blackman [redacted] e-mails with M. Quint and S. Allman [redacted] e-mail to S. Allman”]; Blackman Dec., [doc. 41] p. 23, 10/11/07 [“Prepare correspondence to S. Allman, M. Quint and C. Ciochon; conference call with S. Allman, C. Clochon and M. Quint”].) Defendants make no attempt to justify the number of attorneys working on the case, or to establish that the work performed was not redundant, excessive or unnecessary.¹³

Accordingly, the time sought by defendants should be reduced by at least 50% to account for the excessive and redundant billing, bringing the lodestar to \$20,301.50.

VI. CONCLUSION

Because defendants fail to come within the meaning of a prevailing party pursuant to California Civil Code § 1717, and attorneys’ fees are not otherwise available to defendants, their motions for fees and costs should be denied in their entirety. Defendants have not filed a bill of costs. The only costs awardable to them are those in connection with the contractual fee agreement. Because defendants are not entitled to fees under that agreement and § 1717, they are not allowed non-taxable costs. For all of these reasons, the Court should deny defendants’ motions to be declared the prevailing parties and deny their requests for attorneys’ fees and costs. If the Court

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¹³And no attempt to set forth the qualification of any attorneys’ or paralegals, other than the declarants themselves. (Blackman Dec. [doc. 41] ¶ 3-9; Ciochon Dec. [doc. 42] ¶ 2-4.)

1 finds that attorneys' fees are awardable under the contract and § 1717, then it should
2 award a reduced lodestar of \$20,301.50, plus the costs sought.

3 Dated: January 30, 2008.

4 Respectfully submitted,
5 BRANCART & BRANCART

6
7 /s/
8 Christopher Brancart
9 Attorneys for Plaintiffs
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EXHIBIT 1

PROOF OF SERVICE

I am over the age of 18 and am not a party to the within action. My business address is 8205 Pescadero Road, Loma Mar, California 94021.

On January 30, 2008, I served a true and correct copy of the following document(s):

PLAINTIFFS' OPPOSITION TO DEFENDANTS MOTIONS TO BE DECLARED PREVAILING PARTIES AND FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

upon the following person(s):

Ms. Sara Allman, Allman & Nielsen, 100 Larkspur Landing Circle, Suite 212
Larkspur, CA 94939; and

Mr. John S. Blackman, Farbstein & Blackman, 411 Borel Ave., Suite 425, San
Mateo, CA 94402

	BY HAND DELIVERY: By causing such document(s) to be delivered by hand to the above person(s) at the address(es) set forth above.
	BY MAIL: By placing a copy thereof enclosed in a sealed envelope, with postage thereon fully prepaid, in the United States mail at Loma Mar, California, addressed as set forth above.
	BY THIRD-PARTY COMMERCIAL CARRIER (OVERNIGHT DELIVERY): By delivering a copy thereof to a third-party commercial carrier, addressed as set forth above, for delivery on the next business day.
	BY FACSIMILE: By transmitting the above document(s) to the facsimile number(s) of the addressee(s) designated above.
xx	BY ELECTRONIC TRANSMISSION OF THE "NOTICE OF ELECTRONIC FILING:" By electronically filing the document(s) (All counsel are "Filing Users")

I certify that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on January 30, 2008, at Loma Mar, California.

/s/ Christopher Brancart
Christopher Brancart